

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION**

STATE OF TENNESSEE, STATE OF)
ALABAMA, STATE OF ALASKA, STATE)
OF ARKANSAS, STATE OF GEORGIA,)
STATE OF INDIANA, STATE OF IOWA,)
STATE OF KANSAS, COMMONWEALTH)
OF KENTUCKY, STATE OF MISSISSIPPI,)
STATE OF MISSOURI, STATE OF)
NEBRASKA, STATE OF OHIO, STATE OF)
SOUTH CAROLINA, STATE OF SOUTH)
DAKOTA, STATE OF UTAH,)
COMMONWEALTH OF VIRGINIA,)
STATE OF WEST VIRGINIA,)

Plaintiffs,

v.

EQUAL EMPLOYMENT OPPORTUNITY)
COMMISSION; CHARLOTTE A.)
BURROWS, in her official capacity as Chair)
of the Equal Employment Opportunity)
Commission; UNITED STATES)
DEPARTMENT OF JUSTICE; MERRICK)
B. GARLAND, in his official capacity as)
Attorney General of the United States; and)
KRISTEN CLARKE, in her official capacity)
as Assistant Attorney General for Civil Rights)
at the United States Department of Justice,)

Defendants.

Civil Action No. 3:24-cv-00224
Judge Charles E. Atchley, Jr.
Magistrate Judge Debra C. Poplin

PLAINTIFFS' MOTION FOR A § 705 STAY AND PRELIMINARY INJUNCTION

The Plaintiff States challenge the Equal Employment Opportunity Commission's ("EEOC") "Enforcement Guidance on Harassment in the Workplace" ("Enforcement Document"). *See* Dkt. #1-2. Just like the prior EEOC guidance that this Court enjoined in *Tennessee v. U.S. Dep't of Educ.*, 615 F. Supp. 3d 807 (E.D. Tenn. 2022), the Enforcement Document directs all employers that failing to accommodate an employee's self-professed gender identity—in areas ranging from preferred

pronouns to private changing spaces—violates Title VII. And the Enforcement Document does not make employers liable only for *employees* who do not toe the gender-ideology line. If, for example, a female customer declines to share a bathroom with a biological male employee, the Enforcement Document would require the employer to take “corrective action” against that *customer* or risk liability under Title VII. The resulting regime is a revolutionary reordering of the workplace under threat of severe sanctions that will adversely impact workplace morale, employers’ relationships with their employees, and businesses’ relationships with their customers. The Plaintiff States now seek relief from the Enforcement Document’s gender-identity-accommodation mandates, which are already in effect and inflicting irreparable harm on the Plaintiff States and other employers.

Relief is warranted. *First*, the Plaintiff States are likely to prevail in their challenge because EEOC’s Enforcement Document has no basis in Title VII, exceeds EEOC’s statutory authority, conflicts with the U.S. Constitution, and flunks the requirements of the Administrative Procedure Act (“APA”). Nothing in Title VII punishes employers for maintaining sex-segregated policies that recognize the “genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex.” *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998). Indeed, such policies—like sex-segregated restrooms—are not discriminatory because they treat similarly situated individuals the same: all men must use male facilities, and all women must use female facilities, and all facilities are generally equal. *Bostock v. Clayton County* does not say differently, as there the Court expressly declined to “prejudge” how its decision about terminating a transgender employee would apply to issues like “bathrooms, locker rooms, ... dress codes[,] ... or anything else of the kind.” 590 U.S. 644, 681 (2020). Nor has EEOC identified any other precedent that would require its warped understanding of Title VII. And even if EEOC could find support for its gender-identity-accommodation mandates, it is without statutory authority to promulgate substantive rules like the Enforcement Document.

The Enforcement Document also transgresses constitutional limits under Section 5 of the Fourteenth Amendment by imposing liability on States that is “so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.” *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997). Moreover, compelling adherence to EEOC’s preferred gender-ideology viewpoint infringes bedrock First Amendment speech and religious-freedom rights. EEOC’s refusal to consider “important aspects” of the regime imposed by the Enforcement Document also fails baseline administrative-law requirements for reasoned decision-making. Any one of those legal flaws independently warrants vacating the Enforcement Document.

Second, allowing the Enforcement Document to remain effective during the course of the litigation would inflict multiple irreparable harms on the Plaintiff States. In the absence of interim relief, the Enforcement Document will impose unrecoverable compliance costs and require compliance with rules that conflict with States’ duly enacted laws protecting privacy and safety, in derogation of State sovereignty. Plaintiff States have already begun to incur these compliance costs, and those costs will balloon as the States take additional steps to revise policies, conduct trainings, and incur other expenses to comply with the Enforcement Document.

Third and *fourth*, the requested preliminary relief would not harm EEOC and, if anything, furthers the public interest. EEOC cannot credibly claim to be harmed by maintaining the status quo and enforcing actual violations of Title VII’s non-discrimination provisions, while allowing businesses to maintain sex-separated spaces. The public interest is also served by allowing the Plaintiff States to continue enforcing their duly enacted laws aimed at protecting safety and privacy. Conversely, the public has no interest in seeing EEOC’s unlawful gender-identity-accommodation mandates put in place, as “the public interest lies in a *correct* application” of the law. *Coal. to Def. Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006) (emphasis added).

The Plaintiff States move for preliminary relief under the APA, 5 U.S.C. § 705, which allows courts to grant interim relief from a challenged rule pending judicial review, as well as under Federal Rule of Civil Procedure 65. Specifically, the Plaintiff States request entry of an order:

- a) Declaring the Enforcement Document unlawful under Title VII, the APA and the U.S. Constitution;
- b) Staying the effectiveness of EEOC's Enforcement Document under 5 U.S.C. § 705, and thus denying it legally operative effect, during the pendency of these proceedings;
- c) Preliminarily enjoining Defendants, and any other agency or employee of the United States, from enforcing, relying on, implementing, or otherwise acting pursuant to the Enforcement Document's challenged provisions; and
- d) Granting any and all other preliminary relief the Court deems just and proper.

The Plaintiff States further request that this Court exercise its discretion to waive the security requirement of Federal Rule of Civil Procedure 65(c). No security requirement attends a stay under 5 U.S.C. § 705.

Dated: May 31, 2024

Respectfully submitted,

/s/ Steven J. Griffin

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**Application for admission pending*

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**** Pro Hac Vice Application Pending**

***** Pro Hac Vice Application Forthcoming**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served via the Court's electronic filing system on this 31st day of May, 2024 to all counsel of record. The document was further served via email on the following, who have represented themselves to the undersigned as counsel for Defendants in this matter.

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